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In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 1102

HOUSTON MARITIME ASSOCIATION, INC., ET AL.,
Petitioners

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. 16-23), is reported at 329 F. 2d 259. The Board's original decision and order (Pet. 64-86) are reported at 122 NLRB 692, and its supplemental decision and amended order (Pet. 39-55) are reported at 139 NLRB 352.

JURISDICTION

The judgment of the court of appeals (Pet. 23-24) was entered on February 13, 1964, and its decree was entered on March 26, 1964 (Pet. 24-31). The petition for a writ of certiorari was filed on May 12, 1964. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether substantial evidence supports the Board's finding that the employers participated with the union in maintaining a hiring hall arrangement which discriminated against nonunion employees, both in referrals for employment and in the fees exacted for the use of the hall.

2. Whether the Board exceeded its remedial power by ordering the employers, "jointly and severally" with the union, to refund to the nonunion employees that portion of the fee exacted from them which was not used to defray the expenses incurred in running the union hiring hall.

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*) are reprinted in the Appendix, *infra*, pp. 12-13.

STATEMENT

A. The Board's Findings of Fact

1. The preferential hiring system

Houston Maritime and Master Stevedores are trade associations whose member steamship and stevedoring companies employ clerks, checkers, and timekeepers (herein referred to generally as clerks), represented by Local 1351, Steamship Clerks and Checkers, International Longshoremen's Association (J.A. I 258-261).[1]

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[1] References designated "J.A. I" and "J.A. II" are to volumes I and II of the joint appendix printed for the court below and filed with the petition.

The member companies of the associations utilized Local 1351's hiring hall as the exclusive source for securing their clerks and checkers in the Port of Houston (Pet. 65, J.A. I 258). In administering this hiring hall, Local 1351 maintains a list of applicants available for employment. This list designates members and non-members of the Union. (Pet. 65-66, J.A. I 259.) Whenever the companies require any men, their chief clerks, who are supervisory employees with authority to hire and discharge, telephone the Local's business agent. The business agent reads to the chief clerks the list of available employees, from which the latter select those to be hired (Pet. 63, J.A. I 258-259). Although the business agent normally does not specify which applicants are union or nonunion members, practically all of the chief clerks are union members acquainted with the membership (Pet. 66, J.A. I 259). Moreover, many of the chief clerks serve as officials of the Local and on its committees, including the contract negotiating and grievance committees which bargain with the companies (Pet. 66, J.A. I 259).

Under the International's Constitution, Local 1351 is obligated to give preference in employment to members of a sister local when there are more jobs than its members can handle. This provision contemplates that the Local will give first preference to its own members over other applicants. (Pet. 67, J.A. I 262.)[2] Moreover, the Local's business agent is required by its Constitution to see that the Local's rules are ob-

[2] Earlier contracts of the Local explicitly so provided (Pet. 67, J.A. I 255, 256). The elimination of this provision resulted in no real change in the method of hiring clerks (Pet. 68, J.A. I 258; J.A. II 86, 97-98, 108).

served (Pet. 67, J.A. I 261). The chief clerks, as members subject to the Local's discipline and as union officials, were required to adhere to the Local's constitutionally-imposed policy of preferential hiring (Pet. 67).

Union members were given a preference in hiring. The record shows that members of Local 1351 earned more money than nonmembers, were employed for longer periods of time, and were given the higher paying clerks' jobs rather than the lower paying checker's jobs which nonunion men received (Pet. 67-68, J.A. II 263-272, 320-321). Furthermore, there is evidence of specific discrimination against two experienced nonunion men, Vinson and Linenberg. When they used the Local's hiring hall, they were repeatedly passed over for employment. Not only were members of Local 1351 sent out first, but Vinson and Linenberg were not referred even when no members of the Local were available. Instead, Local 1351's Business Agent Morrow referred company requests for employees to the hiring halls of two sister locals in Houston. (Pet. 67, 72-73; J.A. I 270-274.)

2. The service fee arrangement

All applicants for employment through Local 1351's hiring hall are required to sign a form designating it as their bargaining representative and binding them to pay it a percentage of their wages for "services rendered" (Pet. 68-69, J.A. I 264). In addition, members pay $1 a month dues (J.A. I 268; J.A. II 189). Prior to July 1955, members paid two percent of their wages and nonmembers paid five percent (J.A. I 264, 252; J.A. II 14, 52). Thereafter, both groups paid the same percentage, first five percent and later three percent

(J.A. I 264; J.A. II 14, 252-253, 272-274, 283). The Local commingles all of its receipts, the percentages paid by nonmembers going into its general funds as "dues" (J.A. I 264; J.A. II 189, 190).

Employees are paid by checks which are distributed at the union hall (Pet. 68-69, J.A. I 264; J.A. II 50-52, 105, 123, 132). Prior to July 1955, each employee received one check; he then paid the percentage in cash when he received his check from the business agent (Pet. 69, n. 10; J.A. II 53). Thereafter, the companies prepared two checks. One is for the service fees, the other is for the balance of the employee's wages (Pet. 68-69, J.A. I 264; J.A. II 137-144, 93-94). The business agent gives the employee his wage check after the latter endorses the percentage check over to the Local (Pet. 68-69, J.A. I 265; J.A. II 54-55, 139-142).

Although members and nonmembers pay the same percentage, members receive twice as much insurance as do nonmembers and their families receive death benefits (J.A. I 268 n. 7; J.A. II 187). The cost of operating the Local is paid from its general funds, to which the percentage payments of nonmembers have been allocated (J.A. I 269; J.A. II 174-177, 181-197). In November 1955, each of the stockholders of a corporation named "Avenue N"—whose only property is the building which houses the hiring hall and the Local's offices—received a check for $100 (J.A. I 265; J.A. II 117, 56, 198, 159-160, 164-165, 172). All the stockholders were members of Local 1351, and money they received from the corporation was disbursed from the Local's general funds (J.A. I 265-267).

B. The Board's Conclusions and Order

On these facts, the Board concluded that the associations and their member companies violated Section 8(a)(1) and (3) of the Act by being parties to a hiring arrangement with Local 1351 which gave preference in employment to members of that Local and its sister locals, and which required job applicants as a condition of employment to designate Local 1351 as their bargaining representative and pay it a percentage of their wages;[3] and that, by this conduct and by facilitating Local 1351's collection of such percentages, they violated Section 8(a)(2) of the Act (Pet. 71-72, 41-52). The Board further concluded that Local 1351 and the International, by maintaining and operating the hiring hall on a discriminatory basis, violated Sections 8(b)(1)(A) and (2) of the Act (Pet. 72, 42).[4]

The Board ordered the companies and the Union to cease and desist from the unfair labor practices found and from in any other manner restraining or coercing employees in the exercise of the rights guaranteed by the Act. Affirmatively, the Board ordered, *inter alia*, that the companies and the Union, jointly and sev-

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[3] Members Rodgers and Leedom were of the view that, because of the discriminatory operation of the hiring hall, it was unlawful to charge either members or nonmembers a fee for the use of the hall. Members Fanning and Brown were of the view that the discriminatory operation of the hiring hall merely made it unlawful to exact a fee for the use of the hall from nonmembers. Chairman McCulloch agreed that the exaction of a fee from nonmembers was unlawful—not because the hall was discriminatorily operated, but because, since the monies exacted went into the Local's general funds, the nonmember, unlike the member, was forced to pay for benefits which he did not receive. (Pet. 44-45.)

[4] The Board also found violations of the Act with respect to the specific discrimination practiced against nonmembers Vinson and Linenberg (Pet. 72-73, 42).

erally, refund to all nonmembers the percentage fees exacted from them. The Board provided that the period of liability for the percentages commenced six months prior to the filing and service of the initial unfair labor practice charges, and further provided that each company would be liable only for the monies paid by its own employees (Pet. 45-54).

C. The Court of Appeals' Decision

The court of appeals (per Judge Fahy) held that the Board's unfair labor practice findings were supported by substantial evidence and enforced its order except for the provision requiring reimbursement of the percentage fees (Pet. 18). As to the latter, the court concluded that the Board had improperly ordered reimbursement of all the fees paid by nonmembers. It stated (Pet. 21): "Discrimination in the exaction of the percentages occurred to the extent non-members were required to pay more than the service justified, that is, paid for activities of the Union of which they were not beneficiaries. Affirmative action which goes beyond remedying the discrimination cannot be said to effectuate the policies of the Act." The court remanded the case to the Board "to determine such proportion of the fees paid as was reasonably related to the service provided by the Union, having in mind the cost to the Union of providing the services" (Pet. 21-22).[5]

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[5] The Board has decided to accept the remand.

ARGUMENT

The decision of the court below is correct and is not in conflict with the decision of any other circuit. There is no occasion for further review.

1. Petitioners' contention (Pet. 12-14) that the Board improperly held that they participated with the Union in maintaining the discriminatory hiring arrangement presents only an evidentiary issue which does not warrant review by this Court. *Universal Camera Corp.* v. *National Labor Relations Board*, 340 U.S. 474, 491. In any event, it is clear from the opinion below that the Board's finding has ample support.

2. There is no substance to petitioners' further claim (Pet. 8-12) that, even though the employers (no less than the Union) violated the Act, the Board could not properly order them, jointly and severally with the Union, to reimburse the nonunion employees for a portion of the fees exacted under the illegal hiring arrangement. It is well settled that the Board may order an employer who is party to an illegal union security agreement to reimburse his employees for the dues collected thereunder, though the monies went to the union. See, e.g., *Virginia Electric & Power Co.* v. *National Labor Relations Board*, 319 U.S. 533, 543-545; *Dixie Bedding Manufacturing Co.* v. *National Labor Relations Board*, 268 F. 2d 901, 907 (C.A. 5). The theory of those cases is that the employer, by acquiescing in practices which require his employees against their will and as a condition of employment to support the Union, has contributed to the wrongdoing and thus is properly held responsible for remedying the effects of the unfair labor practice. Cf. *Radio Officers* v. *National Labor Relations Board*, 347 U.S. 17, 54-55. That

imposing a reimbursement obligation on the employer may have the incidental effect of allowing the union to keep a portion of the money it has illegally received,[6] is deemed to be outweighed by the overriding policy of making the employees whole for the losses which they incurred. The same principles are applicable here,[7] and refute petitioners' contention that the Board's refund order would force it to contribute support to the Union, in violation of Section 8(a)(2) of the Act.[8]

Nor is it true that the Board's order as modified by the court below would require petitioners to interject themselves into the internal affairs of the Union. The conduct held illegal is requiring nonunion employees to pay, not only for the cost of the hiring hall, but also for other union activities in which they did not participate. Petitioners can insure that this condition is alleviated without having to keep a continual check on the costs of the Union's normal operations and those of the hiring hall.[9] In any event, the question

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[6] It is the Board's practice in joint and several liability cases to require the employer and the union to split the liability if each is solvent. *National Labor Relations Board* v. *Puerto Rico Steamship Association*, 211 F. 2d 274 (C.A. 1).

[7] Indeed, in this case, it is clear that the employers not only acquiesced in the illegal arrangement but derived benefits therefrom, for they were spared the burden and expense of having to hire on their own.

[8] Section 302(a)(1) of the Labor Management Relations Act (Pet. 8-9), bars the employer from using the employees, absent a valid checkoff authorization, as a conduit for making payments to a labor organization. This is obviously not the case where the employer is required to refund money to the employees.

[9] For example, the Union might agree to charge members and nonmembers the same fee for the use of the hiring hall and to set aside all of the sums collected from such fees exclusively for hiring hall purposes.

is premature and should await the outcome of the further Board proceedings in the case.

CONCLUSION

For the above reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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June, 1964.

APPENDIX

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq*), are as follows:

Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8 (a) (3).

Sec. 8. (a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

(2) to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it: * * *

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: *Provided*, That nothing in this Act, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained or assisted by any action defined in section 8(a) of this Act as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organiza-

tion is the representative of the employees as provided in section 9 (a), in the appropriate collective-bargaining unit covered by such agreement when made; and (ii) unless following an election held as provided in section 9 (e) within one year preceding the effective date of such agreement, the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to rescind the authority of such labor organization to make such an agreement: * * *

(b) It shall be an unfair labor practice for a labor organization or its agents—

(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 7: * * *

(2) to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a) (3) or to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

* * * * *

SEC. 10. * * *

(c) * * * If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act: * * *

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